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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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February 4, 1994

HAND DELIVERED

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: MASS MEDIA BUREAU/VIDEO SERVICES DIVISION
DISTRIBUTION SERVICES BRANCH--REQUEST FOR
MODIFICATION OF ITFS APPLICATION ACCEPTANCE
FREEZE IMPOSED IN MM DOCKET NO. 93-24

Dear Mr. Caton:

Transmitted herewith are an original and 14 copies of the
Petition of American Telecasting, Inc. for limited modification
of the above-referenced application acceptance freeze.

Please contact the undersigned if additional information on
this matter is desired.

Respectfully submitted,


Thomas J. Dougherty, Jr.
Counsel for
American Telecasting, Inc.

cc: Hon. M. Reed Hundt
Hon. James H. Quello
Hon. Andrew C. Barrett
Mr. Blair Levin
Mr. Brian F. Fontes
Mr. Byron F. Marchant
Mr. Roy J. Stewart
Mr. William H. Johnson
Mr. Roderick K. Porter
Ms. Barbara A. Kreisman
Mr. Clay Pendarvis
Ms. Anne Lucey
Mr. Charles P. Gratch

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Freeze on the Acceptance) MM Docket No. 93-24
ITFS Applications)

**PETITION OF AMERICAN TELECASTING, INC.
FOR LIMITED MODIFICATION OF THE
ITFS APPLICATION ACCEPTANCE FREEZE**

The modification of the ITFS application freeze to provide for the acceptance of applications for modification of ITFS licenses to authorize transmitter site moves that constitute "major changes" where the move is to a site shared by one or more authorized MDS or ITFS stations.^{1/}

As explained below, the grant of this Petition will serve the public interest in the promotion of distance learning, in the development of wireless cable as a competitive alternative to cable television systems and in spectrum use efficiency, without causing a disproportionate or even significant application processing burden.^{2/}

1/ By separate petition filed today, ATI also has requested the modification of the freeze on the acceptance of applications for new MDS stations to provide for the acceptance of such applications filed by entities that have access by lease or license to 9 or more of the ITFS and/or MDS channels that will be used with the requested MDS channels.

2/ ATI recognizes that the comment period for the above-captioned docket closed on May 19, 1993. To the extent necessary, ATI requests a waiver of that deadline so that this

(continued...)

I. Background

ATI operates wireless cable systems in Billings, Montana; Colorado Springs, Colorado; Denver, Colorado; Little Rock, Arkansas; Louisville, Kentucky; South Bend, Indiana; Toledo, Ohio; Daytona Beach, Florida; Orlando, Florida; and Fort Myers, Florida. ATI is in the process of developing wireless cable systems in many other communities. ATI is a public company with over \$150,000,000 in capital devoted to the development of ATI's existing and planned wireless cable systems.

On February 1, 1993, the Commission discontinued the acceptance of new ITFS station license applications, along with its acceptance of ITFS major modification applications.^{3/} That action was taken to prevent an expected deluge of applications prompted by fear that the Commission's proposed imposition of a window filing scheme for ITFS applications would delay the planned deployment of ITFS stations.^{4/}

Since that freeze was imposed, the Mass Media Bureau has disposed of, or has processed through the application acceptance phase, virtually all ITFS new station and major modification

^{2/}(...continued)

special Petition may be considered. That waiver is justified by the facts set forth in this Petition, particularly the fact that the freeze on the acceptance of ITFS major modification applications has lasted much longer than originally envisaged. Further, this Petition requests interim action in the above-captioned docket and, accordingly, this Petition is not strictly speaking comments on the Notice of Proposed Rulemaking.

^{3/} 58 Fed. Reg. 12011, 12012-13 (Mar. 2, 1993) (¶ 10).

^{4/} Id.

applications received before the freeze. The freeze has, thus, served much if not all of its intended purpose.

While the freeze was adopted with the assurances that it would be in effect "for a short period of time" and would cause only a "short delay,"^{5/} it has remained in effect long after the time one might expect its abandonment based upon those predictions.

II. Discussion

A. There Is Good Cause to Grant the Requested Relief.

Continuing bar to the filing of applications for large, collocating site moves is harming legitimate wireless cable and educational interests whose plans have been placed in disarray until the Commission decides to remove that aspect of the freeze.

ATI's ITFS capacity lessors desire to collocate channel capacity that already is licensed, but are unable to make the collocation because the ITFS stations in question must be moved over 10 miles to collocate with the other channel capacity made available to ATI. A move of an ITFS transmitter over 10 miles is deemed by the Mass Media Bureau a "major" change and major change applications are barred by the ITFS application freeze.

Unless the channel capacity available to a wireless cable system operator uses collocated transmitters, the capacity is of no value to the operator. The freeze on large site moves for collocation has certain adverse consequences on wireless cable operators, including:

^{5/} Id.

- Existing ITFS channel capacity cannot be used.
- Many operators find it competitively impracticable to provide service prior to channel collocation. They cannot schedule service launch dates and, as a result, are unable to prepare budgets that are essential to financing and planning.
- Many operators are forced for financial reasons to begin operations but, with many ITFS channels spread over useless transmitter sites, they may not be able to reach a critical mass of subscribers who will produce revenue sufficient to cover costs.^{6/}
- Lacking sufficient ITFS channel capacity, the operator that must begin service finds the need to offer unanticipated price discounts to compete, but there is no significant offsetting cost reduction.^{7/}
- The operator in such a situation will tend to suffer a first, but lasting, impression that it offers few channels to subscribers.

The collateral consequences of the freeze on ITFS large site move applications are not limited to wireless cable interests. Existing distance educators also suffer from that aspect of the freeze, because, for example:

- Many ITFS stations operate solely from public funds and are facing the prospect of the reduction, if not the

^{6/} Indeed, many MDS lease agreements entered into without any contemplation of an application freeze require the wireless cable operator to begin making payments for channel capacity that, because of the freeze, cannot be effectively used by the operator. Moreover, many operators began acquiring equipment, building headends and hiring personnel prior to the freeze. These cost centers eventually must be employed in commercial activity or they will destroy a company.

^{7/} The operator with such a channel deficiency still must incur virtually the entire headend cost, but must attempt to recoup this cost plus marketing costs through a reduced amount of subscriber revenue. Significantly, a headend will cost close to \$1,000,000. Little of that cost is the cost of transmitters and combiners. Consequently, most of the headend cost must be incurred regardless of whether the wireless operator uses 2 or 32 channels.

abandonment, of distance learning programs due to State and municipal revenue shortfalls. Their future depends upon capacity leasing to wireless cable operators. Yet, these existing ITFS stations tend not to be located where they can serve the wireless cable operator's interest.^{8/} Until they can be collocated with the other channels used in a wireless cable system, the wireless cable operator generally cannot justify paying royalties to the ITFS licensee.

- Similarly, the wireless cable operator cannot afford to pay to build a new ITFS station at other than the wireless cable transmitter site and, consequently, until the license for an unbuilt ITFS station authorizes collocation, the ITFS station will not offer any of its public benefits.
- The economic harm caused by the freeze to the wireless operator indirectly but significantly impairs distance education prospects because the financial lifeline of the ITFS station is the periodic capacity lease payments from the wireless operator.

The ban on applications to move ITFS stations over 10 miles, thus, harms existing ITFS licensees.

ATI believes that its request for limited modification of the freeze will preserve the Bureau's flexibility in application processing, and will allow legitimate educational and wireless cable interests to pursue their plans in a rational and organized fashion, but will not add significantly to the Commission's application processing burden.^{9/} The Commission might note that

^{8/} The existing ITFS stations in an area often are scattered among various transmitter sites because they are licensed to separate educational systems and operated independently of one another.

^{9/} Given the Mass Media Bureau's liberal view toward construction extension applications, ATI doubts that major site change applications would be filed in any significant number by those just seeking to buy time to construct. Rather, most if not all such applications are likely to be filed by licensees who need to change sites for legitimate reasons. Further, the
(continued...)

that the MDS processing staff also faces a severe processing burden, but the MDS application freeze does not apply to applications by MDS licensees to move the authorized location of their stations.

Moreover, ATI's requested freeze modification will do much to reduce vexing and complex interference problems that afflict licensees and the Commission alike, and to promote the more efficient use of the ITFS radio spectrum. At present, the scattering of ITFS stations at various sites in an area makes it difficult to design new facilities for that area or for nearby areas.^{10/} If all of the ITFS facilities in an area were operated with identical antennas, polarizations, carriers and powers from one transmitter site, then the design of new or modified ITFS facilities for the area would become quite simple, as would the design of new or modified ITFS facilities for nearby areas. Another favorable result of collocation is reduced operating costs, which perforce conduces to the wider use of ITFS. Finally, collocation results in a reduction of areas where reception is made more difficult or precluded by adjacent channel signal strength. As a result, there is more efficient use of ITFS spectrum.

^{9/} (...continued)

proposed requirement for the move to result in a collocation will ensure that, at least, the move conduces to a reduction in interference and/or to the more efficient use of the spectrum.

^{10/} An irony of this aspect of the freeze is that post-freeze new station applications have had to propose system designs to protect existing ITFS stations which, after the freeze, will be entirely reconfigured.

Importantly, ATI's request for modification of the freeze scheme will reverse a processing priority which, in effect, gives precedence to new ITFS stations over the needs of existing stations for large site moves. As a result of the freeze, existing ITFS licensees who have concrete and time-sensitive plans requiring site moves must sit back and wait while the Commission processes a large number of new station applications filed before the freeze. From a regulatory perspective, the precedence accorded to a request to modify the facilities of an existing station should be greater than that accorded to a request for a new station license, not less. Such modification requests are more likely to be implemented--and more likely to be implemented rapidly--than proposals for new stations, many of which are proposed by educational institutions having no prior experience with ITFS and supported by proposed capacity lessees who have not demonstrated any significant commitment to developing the ITFS channels. Thus, by improving the priority of major modification applications, the Commission will be promoting real uses of ITFS spectrum which are more likely of prompt effectuation.

ATI does not see a significant connection between the Commission's reasons for imposing the freeze and the inclusion of large, collocating site move applications within the category of freeze-barred applications. As stated in the Notice of Proposed Rulemaking, the freeze was imposed to prevent the Commission from being inundated with applications hastily filed to avoid the

filing preclusion of the proposed window filing period scheme.^{11/} There simply is no basis to expect a large number of major modification applications for the purpose of the collocation of facilities.^{12/}

It is important for the Commission to understand that ATI is asking for relief from only a narrow part of the freeze--that part which caused disruption to channel capacity aggregation plans which were already in existence at the time the freeze was imposed. It takes years to aggregate the critical mass of channels required to operate a competitive wireless cable system. The freeze on large site move applications was imposed during the process of ATI's existing market development activity. That freeze was never anticipated. As a result, ATI was not prepared for the freeze or its effects on ATI. The relief ATI requests will restore ATI, and similarly situated educators and wireless cable system operators, to the status quo ante.

B. The Modification Can Be Granted Without Prior Notice and Comment.

The limited relief ATI is requesting can be granted quickly, and without the prior notice or comment normally required by

^{11/} 58 Fed. Reg. at 12012 (para. 10).

^{12/} Indeed, new ITFS station license applications for an area tend to be filed virtually simultaneously by 5 educational interests and tend to request equivalent facilities, all located at the most desirable transmitter site. Such licensees would not be able to employ the freeze exemption, except in those instances in which they seek to move to the authorized MDS site in an area. Further, as explained in note supra, there really is no reason to expect significant use of this new freeze exception as an illegitimate excuse for additional time to construct ITFS stations.

Section 553 of the Administrative Procedure Act. Quite simply, as the imposition of the freeze was a procedural action exempt from Section 553's notice and comment prerequisites,^{13/} so the modification of the freeze is exempt from those procedures. Indeed, the MDS application acceptance freeze does not bar the filing of applications for authorization of large MDS station site moves.^{14/} If that exception to the MDS freeze was lawfully imposed without prior notice or comment, then certainly the Commission could also exempt ITFS facility modification applications from the freeze without prior notice or comment.

III. Conclusion

ATI's proposed modification to the freeze provides wireless cable system operators and educators with the ability to complete their channel construction activities without opening the Commission's doors to a large number of applications. In fact,

^{13/} Notice of Proposed Rulemaking, FCC 93-90, at para. 9 n.12.

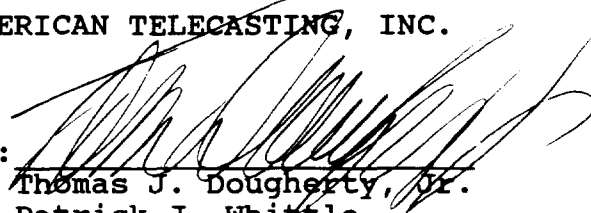
^{14/} Notice of Proposed Rulemaking, 7 F.C.C. Rcd. 3266, 3270 (para. 19 and n.34) (1992) (P.R. Docket No. 92-80).

allowing such filings will bring radio frequency simplicity and efficiency to many areas where spectrum chaos reigns.

Respectfully submitted,

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By:


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January 24, 1994

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